

UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

\* \* \*

JAMES BARKER.

Case No. 3:19-cv-00158-MMD-WGC

v

**Plaintiff.**

## ORDER

BAKER, *et al.*,

## Defendants.

## I. SUMMARY

*Pro se Plaintiff James Barker, currently incarcerated and in the custody of the Nevada Department of Corrections (“NDOC”), filed a first amended complaint under 42 U.S.C. § 1983. (ECF No. 10-1 (“FAC”)). The Court screened the FAC and allowed Barker to proceed on his Eighth Amendment cruel and unusual punishment and Fourteenth Amendment equal protection claims against Defendants Smith and Malay, based on Defendants alleged opening of Barker’s cell door while he was using the restroom. (ECF No. 16 at 4-6.) On February 16, 2021, Barker filed a motion for leave to file a second amended complaint (ECF No. 22 (“Motion”)) and attached his proposed second amended complaint (ECF No. 22-1 (“SAC”)).*

Before the Court is the Report and Recommendation (ECF No. 27 (“R&R”)) of United States Magistrate Judge William G. Cobb. The R&R recommends the Court deny Barker’s Motion and that this action proceed on the FAC as outlined in the Court’s FAC screening order (ECF No. 16). Barker timely filed his objection (ECF No. 28 (“Objection”)) to the R&R, and Defendants did not file a response. Because the Court agrees with Judge Cobb and as further explained below, the Court overrules Barker’s Objection and will adopt the R&R in full.

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1       **II. BACKGROUND**

2                  The Court incorporates by reference Judge Cobb's recitation of the factual  
3 background provided in the R&R, which the Court adopts here. (ECF No. 27 at 1-3.)

4       **III. LEGAL STANDARD**

5                  **A. Review of the Magistrate Judge's Recommendation**

6                  This Court "may accept, reject, or modify, in whole or in part, the findings or  
7 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party  
8 timely objects to a magistrate judge's report and recommendation, then the Court is  
9 required to "make a de novo determination of those portions of the [report and  
10 recommendation] to which objection is made." *Id.* The Court's review is thus *de novo*  
11 because Barker filed his Objection. (ECF No. 28.)

12       **IV. DISCUSSION**

13                  Following a *de novo* review of the R&R and other records in this case, the Court  
14 finds good cause to accept and adopt Judge Cobb's R&R.

15                  Judge Cobb recommends Barker's Motion be denied as it was filed outside of the  
16 scheduling order deadline and Barker failed to provide good cause to grant leave to  
17 amend. (ECF No. 27 at 5.) Judge Cobb further recommends that the Motion be denied as  
18 amendment would be futile. (*Id.*) Barker counters that amendment is not futile because  
19 defendant Alredd<sup>1</sup> knew that Barker was using the bathroom. (ECF No. 28 at 2-3.) Barker  
20 additionally counters that defendant Bennett<sup>2</sup> searched him as a response to Barker filing  
21 grievances. (*Id.*) The Court agrees with Judge Cobb.

22                  The scheduling order in this case was entered on November 24, 2020 and the  
23 deadline to add parties or claims was January 22, 2021. (ECF No. 20 at 1-2.) Barker filed  
24 his Motion on February 16, 2021—nearly a month after the deadline—seeking leave to file  
25 his second amended complaint to add Alredd and Bennett as defendants. Because Barker  
26 is now seeking to add parties after the Court has entered a scheduling order, Federal Rule

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27                  <sup>1</sup>Alredd was previously dismissed from this action. (See ECF No. 16.)  
28                  <sup>2</sup>Bennett was previously dismissed from this action. (See ECF No. 16.)

1 of Civil Procedure 16(b)(4)'s "good cause" standard for modifying a scheduling order  
2 applies, not Rule 15(a)(2)'s more lenient amendment standard that Barker cites in his  
3 Objection. The "good cause" standard of Rule 16(b) "primarily considers the diligence of  
4 the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,  
5 609 (9th Cir. 1992). While the Court may consider prejudice to the nonmoving party as  
6 additional reasons to deny a motion, "the focus of the inquiry is upon the moving party's  
7 reasons for seeking modification. *Id.* Here, Barker does not provide an explanation, let  
8 alone good cause, but merely states that he is seeking to give "a more complete picture  
9 as to what occurred." (ECF No. 22 at 1.) The Court, however, finds that this fails to meet  
10 Fed. R. Civ. P. 16(b)(4)'s good cause standard.

11 Moreover, Barker's SAC alleges that Alredd repeatedly opened Barker's cell door  
12 and forced it open. However, the SAC—similar to the FAC—fails to allege that Alredd  
13 knew Barker was using the restroom at the time or that Alredd acted with intent to cause  
14 Barker psychological damage. Similarly, the SAC also fails to sufficiently allege facts that  
15 Bennett violated Barker's rights under the Eighth Amendment, Fourteenth Amendment, or  
16 that Bennett engaged in retaliation. Barker's allegations in the SAC against Bennett are  
17 vague and conclusory at best. Accordingly, Barker's Objection is overruled. The Court  
18 therefore agrees with Judge Cobb that Barker's Motion should be denied and will adopt  
19 the R&R in its entirety.

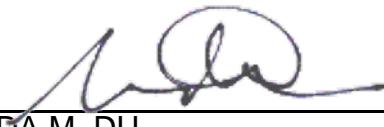
20 **V. CONCLUSION**

21 It is therefore ordered that the Report and Recommendation of Magistrate Judge  
22 William G. Cobb (ECF No. 27) is accepted and adopted in full.

23 It is further ordered that Plaintiff Barker's motion for leave to file a second amended  
24 complaint (ECF No. 22) is denied.

25 It is further ordered that this action proceed in accordance with the first amendment  
26 complaint screen order (ECF No. 16).

27 DATED THIS 20<sup>th</sup> Day of May 2021.

28   
MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE